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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. 71-719

BRADLEY LUMBER COMPANY, INC., *Petitioner,*

v.

ALICE K. SHARPE, *Respondent,*

AND

BRADLEY LUMBER COMPANY, INC., *Petitioner,*

v.

JUANITA SHARPE, By Her Next Friend, H. L. King, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

Opinion below 1

Jurisdiction 2

Questions involved 2

Constitutional amendment and rule involved 3

Statement of cases 3

Reasons for granting the writ 9

1. The decision of the Court of Appeals so far departs from the accepted course of judicial proceedings that this Court should exercise its supervisory power 9

2. The action of the Court of Appeals deprived Bradley Lumber Company, Inc., of its constitutional guarantee to a jury trial 13

3. There is a fatal deficiency in the findings of fact 14

Conclusion 15

APPENDIX

1. Judgment of the Court of Appeals, 446 F. 2d 152 ..... A-1

2. Order denying Petition for Rehearing A-8

3. Opinion of District Court, 329 F. Supp. 405 ..... A-9

4. Judgment of District Court A-20

CITATIONS

CASES:

Duckworth v. Metcalf, 268 NC 340, 150 SE 2d 485 (1966) 14

Gilkey v. United States, 213 F. Supp. 387 (U.S. D.C., W. D. Arkansas, 1963) 13

Guitierrez v. Waterman Steamship Corp., 373 U. S. 206, 10 L Ed 2d 297, 83 S Ct. 1185 (1963) 11

Hayes v. Elon College, 224 NC 11, 29 SE 2d 137 (1944) 12

Hinson v. Chemical Corp., 230 NC 476, 53 SE 2d 448 (1949) 14

Hodge v. McGuire, 253 NC 132, 69 SE 2d 227 (1952) 12

Peterson v. McLean Co., 248 NC 439, 103 SE 2d 479 (1958) 12

United States of America v. National Association of Real Estate Boards, 339 U.S. 485, 94 L Ed 1007 at 1016 (1950) 12

Zenith Radio Corp. v. Hazeltine Research, 395 US 100, at 123, 23 L Ed 129 at 148, 89 S Ct. 1562 (1969) 10

MISCELLANEOUS:

Federal Rules of Civil Procedure, Rule 52(a), 28 U.S.C.A. 3

United States Constitution, Amendment VII 3

Restatement, Agency, §220, Comment c (1958) 12

Restatement, Agency 2d §265 13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Bradley Lumber Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 19, 1971. The Court of Appeals entered an order denying petition for rehearing on September 3, 1971.

OPINION BELOW

The opinion of the Court of Appeals, reported in 446 F. 2d 152, appears in the Appendix hereto. Order of the Court of Appeals denying petition for rehearing, unreported, appears in the Appendix. The opinion rendered by the District Court for the Middle District of North Carolina,

reported in 329 F. Supp 405, appears in the Appendix. Judgment of the District Court, unreported, appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 19, 1971. A timely petition for rehearing *en banc* was denied on September 3, 1971, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

In addition to the petitioner, Bradley Lumber Company, Inc., three individuals were named as original defendants in the District Court: Leonard Ross Lewis, R. K. Grindstaff, Sr., and Ronald K. Grindstaff, Jr.

QUESTIONS PRESENTED

Based upon substantial evidence the District Judge, sitting without a jury, found that the defendant Lewis was not an employee of petitioner, Bradley Lumber Company, Inc. On appeal the Court of Appeals substituted its findings of fact and concluded that Lewis was Bradley's employee.

1. Did the Court of Appeals violate Rule 52, Federal Rules of Civil Procedure, by improperly substituting its findings of fact for those of the District Court whose findings of fact were neither clearly erroneous nor found to be clearly erroneous by the majority, and whose findings of fact and conclusions of law were expressly approved by the dissenting judge?

2. Should the Court of Appeals be allowed to order entry of judgment against petitioner when its opinion did not contain a necessary finding of fact to support such judgment, to wit: that Lewis was acting in the course of employment for petitioner when the accident occurred?

CONSTITUTIONAL AMENDMENT AND RULE INVOLVED

FEDERAL RULES OF CIVIL PROCEDURE, RULE 52(a), 28 U.S.C.A.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

UNITED STATES CONSTITUTION, AMENDMENT VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

STATEMENT OF THE CASES

These two civil actions were consolidated for trial and, by agreement of the parties, tried by District Judge Eugene

A. Gordon without a jury. Jurisdiction was based on diversity of citizenship, the plaintiffs Sharpe being residents of Georgia and all defendants being residents of North Carolina.

The Sharpes sought to recover damages for their personal injuries arising out of a collision in North Carolina on November 25, 1966, between the automobile in which they were riding and a tractor-trailer truck being operated by Lewis. They sought to recover against Lewis; Grindstaff, Sr.; Grindstaff, Jr.; and Bradley Lumber Company, Inc. (hereinafter referred to as Bradley). The Sharpes contended that Lewis was an employee of both Bradley and the Grindstaffs' partnership and that he was acting for his joint masters at the time of the accident. The Grindstaffs, who owned the truck, stipulated that Lewis was their employee and that if Lewis were found to be negligent such was imputable to them. Bradley denied that Lewis was its employee and denied that Lewis was acting in the course and scope of its employment.

The District Court found that Lewis was negligent and entered judgment for the Sharpes against Lewis and the Grindstaffs. The Court found that Lewis was not an employee of Bradley and entered judgment denying the Sharpes any recovery from Bradley. The Sharpes appealed to the Court of Appeals for the Fourth Circuit contending that they should also have judgment against Bradley. No appeal being taken by or against Lewis and the Grindstaffs, they did not participate in the Court of Appeals proceedings.

While part of the trial was devoted to issues of negligence, most of the 5½ day trial concerned the issue of whether Lewis was Bradley's employee and was acting in the course and scope of Bradley's employment. The lengthy trial culminated 28 months of pre-trial discovery which involved numerous hearings on motions and objections over

which Judge Gordon presided. The extensive discovery evidence, and the testimony and other evidence offered at the trial, concerning for whom Mr. Lewis worked at the time of the accident, established that Bradley was in the lumber business at Marion, N. C. Ronald Grindstaff, Jr. and R. K. Grindstaff, Sr. were partners in the sawmilling and contract hauling business at Green Mountain, North Carolina, across the mountain from Marion. Lewis was employed by Grindstaff as driver of a tractor-trailer owned and operated by Grindstaff. Lewis lived at Marion. Grindstaff, Jr. (a son of Pierce Bradley's sister) and Lewis had worked for Bradley before Grindstaff, Jr. went into partnership with his father. Grindstaff, Jr. then left Bradley's employment. Lewis also left Bradley's employment and went to work for a gravel company. Subsequently Grindstaff employed Lewis as a driver. From time to time Bradley ordered lumber from Grindstaff as well as from many other sawmills. Bradley also engaged the Grindstaff partnership for contract hauling and leased one tractor-trailer (not the one involved in this case) from Grindstaff.

It was because of the family relationship and the fact that R. K. Grindstaff, Jr., had worked for Bradley at one time that Grindstaff was designated an officer and director along with Mr. and Mrs. Bradley of Bradley Lumber Company. The undisputed facts are that the business was actually run by Mr. Bradley with the assistance of Mrs. Bradley and that R. K. Grindstaff, Jr., performed no functions as an officer or director of the company.

On the day of the accident, November 25, 1966, Lewis had been sent on a trip by Ronald K. Grindstaff, Jr., driving a Grindstaff owned and operated tractor-trailer, to haul a load of lumber to United Furniture Company in Lexington, North Carolina.

The load of lumber hauled by Lewis to Lexington on November 25, 1966, was part of a larger order of lumber

which had been ordered by United Furniture Company from Elliott Lumber Company, Greensboro, North Carolina, for delivery to United in Lexington. Elliott, in turn, ordered the lumber from Bradley Lumber Company, Inc., for delivery to United at Lexington. Bradley, in turn, ordered some of the lumber from R. K. Grindstaff & Son and some from another supplier, in filling Elliott's order, all of which was purchased f.o.b. Lexington. The Grindstaffs, through their driver Lewis, had just completed delivery to United at Lexington of a trailer load of the lumber, so ordered, when the accident occurred.

The lumber which had been delivered to United Furniture Company was green, having just been cut by the Grindstaffs on their property on Green Mountain and brought on three straight-bed trucks over the mountain and down to Marion and there, with the use of a forklift, transferred to a tractor-trailer truck owned by the Grindstaffs. The loading was supervised by Ronald K. Grindstaff, Jr., and done by three of his employees at Bradley Lumber Company where a forklift was available to transfer the lumber onto the trailer. Grindstaff, Jr., had then called Lewis and directed him to deliver the lumber to United Furniture Company. Lewis had left early in the morning and had driven to Lexington where the lumber was unloaded. Rather than returning direct to his home in Marion, Lewis had proceeded in a southerly direction on U. S. Highway 29, pursuant to the instructions of Ronald Grindstaff, Jr., to take the truck to Charlotte to have some work done on it. The evidence is clear that but for these instructions from Grindstaff, Lewis would not have driven on U. S. 29 where the accident occurred.

Lewis and Grindstaff, Jr., testified that Lewis was employed by R. K. Grindstaff & Son, that Lewis was acting in the course of such employment at the time of the accident, and that he was not employed by Bradley.

The evidence established that Mr. Lewis was carried on the payroll and other records of Bradley Lumber Company as was Ronald K. Grindstaff, Jr., merely as an accommodation to both of them. Neither of them took orders from Bradley and neither of them performed any duties for Bradley. The Bradley payroll checks to Lewis and Grindstaff, Jr., plus a 10% charge, were credited by Bradley against amounts it owed R. K. Grindstaff & Son for the use of a leased vehicle (which was not the vehicle involved in the accident) and for contract hauls. Grindstaff, Jr., hired Lewis for R. K. Grindstaff & Son and Lewis took all of his orders from Grindstaff, Jr., and worked exclusively for R .K. Grindstaff & Son. Bradley was one of the customers of the Grindstaffs in their lumber and hauling business. The Grindstaffs sold lumber to Bradley, did some contract hauling for Bradley, and leased a vehicle (not the one involved in this case) to Bradley. The Grindstaffs' operations and office facilities were limited; and Bradley agreed to carry Grindstaff, Jr., and Lewis on his payroll records as an accommodation—for record keeping, tax withholding and insurance purposes. The amount of Lewis' weekly pay was calculated in Marion by Lewis and Grindstaff, Jr., according to Lewis' mileage and hours and it was a further convenience to pay Lewis promptly with a check drawn in Marion.

The tractor-trailer truck which was driven by Lewis was owned by Grindstaff, Jr., for the partnership, R. K. Grindstaff & Son. It was neither owned nor leased by Bradley. Bradley did not direct its movements and did not pay for its maintenance and operation. After the accident, it was repaired at the expense of R. K. Grindstaff & Son.

At the conclusion of the trial the judge found as a fact that Lewis was not Bradley's employee. With such finding it was unnecessary to make any finding as to whether or

not Lewis was acting within the course and scope of employment for Bradley at the time of the accident. Some excerpts from the District Court's opinion are as follows: "During the trial, evidence unfolded a rather unique business arrangement between Lewis, the Grindstaffs, and Bradley Lumber Company, Inc. . . . Because of the records made pursuant to the above, it appears on paper that Ronnie and Lewis were both employees of Bradley. However, the inclusion of their names on the payroll was in the nature of an accommodation, entitling them to participate in insurance plans which, due to the size of Grindstaffs' operation, would not otherwise have been available. Ronnie Grindstaff personally hired Lewis, set his wages, and was the only person exercising supervisory authority over him. He alone authorized trips and assigned routes. Though Bradley could have ceased doing business with the Grindstaff partnership, he could not have terminated Lewis' employment with Grindstaff." The District Court also found: "In relation to Bradley Lumber Company, Inc., Ronnie Grindstaff stood as an independent contractor . . . Since Bradley Lumber Company, Inc., retained no control over Lewis or Grindstaff as individuals nor over their method of operation, the corporation cannot be considered the employer. Bradley Lumber Company, Inc., therefore, is not liable for the negligence of Lewis on November 25, 1966."

On appeal by the Sharpes, the Court of Appeals, without stating that the District Court's findings were clearly erroneous, found that Bradley did retain control over Lewis and that Lewis was Bradley's employee. After enumerating a number of evidentiary matters, it stated: "Although Pierce Bradley testified that he did not supervise any of Lewis' activities, we think there can be no doubt that Bradley Lumber Company retained the right to control Lewis. If, as the appellee claimed, the arrangements with respect to Lewis' employment were rooted in a desire of Grindstaff

and Bradley to effect a 'convenient accommodation,' this does not alter the legal consequences of their agreement, particularly when the rights of innocent third parties injured by Lewis' negligence are involved." Thereupon the Court of Appeals ordered that judgment be entered against the petitioner Bradley Lumber Company even though it made no finding that Lewis was acting in the course of his employment, a prerequisite under North Carolina law.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS SO FAR DEPARTS FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS THAT THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER.

We urge this Court to grant the petition for certiorari for the reason that in setting aside the District Court's findings and substituting its own findings of fact, the Court of Appeals ignored the mandate of Federal Rules of Civil Procedure, 28 U.S.C.A., Rule 52, which restricts the right to set aside findings of fact to those situations where the District Court, sitting without a jury, was clearly erroneous.

In the dissenting opinion below, Judge Winters stated: "In my view, the District Judge correctly found the facts and correctly concluded that '[s]ince Bradley Lumber Company, Inc., retained no control over Lewis or Grindstaff as individuals nor over their method of operation, the corporation cannot be considered their employer . . .'" Judge Winters did not base his dissent on the grounds that the District Court findings were not clearly erroneous; rather, he declared his opinion that the findings and conclusions were correct. Under the circumstances, with two judges agreeing on the findings and two judges disagreeing, how can it be said that the District Court was clearly erroneous?

The Court of Appeals substituted itself as the fact-finder and in so doing violated the mandate of Rule 52 as recently interpreted by this Court:

> In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." *Zenith Radio Corp. v. Hazeltine Research*, 395 US 100, at 123, 23 L. Ed. 129 at 148, 89 S Ct. 1562 (1969).

In fact, the Court of Appeals made no reference to the District Court's findings being clearly erroneous. Nor did the Court of Appeals state that it had a definite and firm conviction that a mistake had been committed.

While, admittedly, the payroll and tax records in the District Court seemed to indicate that Lewis was an employee of Bradley, the oral testimony established that he was not and explained why the records indicated Lewis as an employee. The District Court received and read the written records and saw and heard the witnesses. Three of the witnesses who knew the most about the Lewis-Grindstaff-Bradley relationship testified that Bradley had no control over Lewis and that Lewis was not Bradley's employee. Upon evaluating all the evidence, the District Court con-

cluded that the oral testimony was true. The majority of the Court of Appeals, without having the opportunity to see and hear the witnesses, to observe their demeanor on the witness stand and to judge their credibility, rejected the oral testimony and found the facts to be as appeared on the written records. This action is such a shocking departure from the accepted course of judicial proceedings, we believe, as to justify this Court's granting certiorari in order to insure compliance with Rule 52 not only in this case but in future cases as well, and to avoid a gross injustice to the petitioner. In an earlier case where records and oral evidence were in conflict, this Court, applying Rule 52, reversed the Court of Appeals opinion and ordered the District Court's findings reinstated. *Guitierrez v. Waterman Steamship Corp.*, 373 U. S. 206, 10 L. Ed 2d 297, 83 S Ct. 1185 (1963); *reversing* 301 F. 2d 415 (1st Cir., 1962); *reversing* 193 F. Supp. 894 (D.C. P.R., 1961). Mr. Justice White, speaking for the majority, said:

> To be sure, there is some conflict between details of the testimony and respondent's records of the unloading, but the trial court was entitled to believe the one rather than the other. As for the possibility that the beans petitioner slipped on may have come from some other source, such as "for all that appears" a third party, it is sufficient to note that the trial court was not plainly erroneous in not so believing. 373 U. S. at 211, 10 L ed 2d at 301 and 302.

An extraordinary aspect of this case is that the Court of Appeals reached its conclusion, reversing the findings of fact, even though the Sharpes themselves, in their appeal from the District Court, did not challenge the findings of fact of the District Court. On page 32 of their brief appeared the following statement: "Throughout this brief the Dis-

trict Court's specific findings of fact on material points are not attacked. It is the conclusions of law the District Court drew that form the basis of this appeal." This statement thus conceded the propriety of the finding of the District Court that petitioner had no control over Lewis. Determination of no control was, under North Carolina law, tantamount to a finding that Lewis was not Bradley's employee. *Peterson v. McLean Co.*, 248 NC 439, 103 SE 2d 479 (1958); *Hodge v. McGuire*, 253 NC 132, 69 SE 2d 227 (1952); and *Hayes v. Elon College*, 224 NC 11, 29 SE 2d 137 (1944). And whether or not Lewis was an employee of Bradley was an issue for the trier of fact. *Restatement, Agency*, §220, Comment c (1958).

The majority of the Court of Appeals drew unfair inferences from the oral testimony, as was evidenced by this remark in the opinion: "Pierce Bradley's *belated* disavowal of Lewis as an employee after the accident that injured the Sharpes cannot prevail over the clear evidence to the contrary in this record." (Emphasis added.) There was neither any evidence nor indication that Mr. Bradley was being untruthful or that he devised a scheme to disavow responsibility, after the accident happened. It was not proper for the Court of Appeals to put that interpretation on his testimony. An earlier observation of this Court is in point:

> It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent . . . We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'' *United States of America v. National Association of Real Estate Boards*, 339 U. S. 485, 94 L Ed 1007 at 1016 (1950).

Aside from Bradley's testimony, the testimony of Messrs. Lewis and Grindstaff, Jr., clearly indicated Lewis was not Bradley's employee—and that testimony was against their interest!

The Court of Appeals referred to the rights of innocent third parties as some justification for its overruling the District Court. Yet the arrangement between Lewis, Grindstaff and Bradley was innocent of purpose and not prejudicial to the Sharpes. Not knowing of the arrangement, the Sharpes could not have relied on it nor can they argue that the arrangement estopped Bradley from proving the true relationship. *Restatement, Agency* 2d, §265; *Gilkey v. United States,* 213 F. Supp. 387 (U. S. D. C., W. D. Arkansas, 1963).

2. THE ACTION OF THE COURT OF APPEALS DEPRIVED BRADLEY LUMBER COMPANY, INC., OF ITS CONSTITUTIONAL GUARANTEE TO A JURY TRIAL.

The Seventh Amendment to the United States Constitution preserves to parties litigant the right to trial by jury. The Federal Rules of Civil Procedure permit the parties to waive jury trial and, upon such waiver, designate the District Court as the trier of fact with responsibility to make specific findings of fact. The Rules restrict the Court of Appeals to setting aside findings of fact only when the same are clearly erroneous. A waiver of jury trial by parties litigant is done with knowledge of the rules and is conditioned upon compliance with the rules by the federal courts. When there is an obvious violation of the rules, as here, the condition upon which jury trial was waived is not met. We believe the petitioner's constitutional right to jury trial has been denied in this case because a condition on which it waived jury trial was not met: the Court of Appeals not only set aside the District Court findings but acted as trier of fact and substituted new findings of fact when the find-

ings of the District Court were not clearly erroneous and the Court of Appeals did not find that they were clearly erroneous.

3. THERE IS A FATAL DEFICIENCY IN THE FINDINGS OF FACT.

In North Carolina, in order to hold a master responsible for the acts of his servant, it must be found that the servant was acting in the course and scope of his employment for the master at the time of the accident or other event giving rise to the plaintiff's claim. *Duckworth v. Metcalf*, 268 NC 340, 150 S E2d 485 (1966) and *Hinson v. Chemical Corp.*, 230 NC 476, 53 SE 2d 448 (1949). In the District Court, no findings on this point were necessary since the Court found that Lewis was not Bradley's employee. The majority has not purported to find Lewis to have been acting in the course and scope of his employment for Bradley and, therefore, judgment against Bradley could not be entered properly with the present findings of the Court of Appeals.

The significance of this defect is basic because all of the evidence was to the effect that Lewis had unloaded the lumber at United Furniture Company in Lexington and, at the time of the accident, was on his way to Charlotte under the instructions of Grindstaff to have certain work done on the Grindstaff trailer. The evidence was clear that Lewis was on an exclusive Grindstaff mission and it was also clear that Lewis would not have been on the particular highway where the accident occurred had he not been going to Charlotte as directed by Grindstaff. We strongly believe that upon a determination of all necessary facts in the accepted course of judicial proceedings, even if Lewis were Bradley's employee, the factfinder would determine that Lewis was not acting in the course of his employment for Bradley at the time of the accident.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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November ____, 1971

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NO. 71-1050

Alice K. Sharpe and Juanita Sharpe, by her next friend, H. L. King,

Appellants,

VERSUS

Bradley Lumber Company, Inc.,

Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

(Argued May 13, 1971 Decided July 19, 1971)

Before SOBELOFF, Senior Circuit Judge, and WINTER and CRAVEN, Circuit Judges.

John M. Minor (Deal, Hutchins and Minor, Fred S. Hutchins, and William Kearns Davis on brief) for the Appellants, and Richmond G. Bernhardt, Jr., and W. F. Womble (Smith, Moore, Smith, Schell and Hunter, and Womble, Carlyle, Sandridge and Rice on brief) for the Appellee.

SOBELOFF, Senior Circuit Judge:

This appeal presents a question of agency under the North Carolina law.

On November 26, 1966, an automobile driven by Alice Sharpe was involved in a collision with a tractor-trailer driven by Leonard Lewis and owned by R. K. Grindstaff & Son, a partnership. Mrs. Sharpe's husband and son were killed in the accident and she and her eleven-year-old daughter, Juanita, were seriously injured. This suit was

instituted under diversity of citizenship in the United States District Court for the Middle District of North Carolina by Mrs. Sharpe and her daughter against Lewis, the Grindstaff partnership, and Bradley Lumber Co., seeking recovery for permanent injuries, pain and suffering, and medical expenses.[1] The complaint averred that Lewis was the agent of both Grindstaff & Son and the Bradley Lumber Company.

The District Court found Lewis guilty of negligence and entered judgment against him and the Grindstaff partnership in the amounts of $50,000 for Mrs. Sharpe and $65,000 for Juanita. Lewis and the partnership do not appeal from that judgment. The court concluded, however, that under North Carolina law Lewis was not the agent or employee of Bradley Lumber Company at the time of the accident, and accordingly dismissed the action against the company. This is the ruling the Sharpes appeal, raising the single issue of whether Lewis was Bradley Lumber Company's agent or employee as well as R. K. Grindstaff & Son's.

I

As defined by the Supreme Court of North Carolina, the test for determining the existence of a principal-agent or employer-employee relationship is "whether the party for whom the work is being done has the *right to control* the worker with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has the right of control, it is immaterial whether he actually exercises it." *McCraw v. Calvine Mills, Inc.*, 233 N.C. 524, 64 S.E. 2d 658, 660 (1951) (emphasis

1. Wrongful death actions are now pending in a North Carolina state court on behalf of the personal representatives of Mrs. Sharpe's deceased husband and son.

added); see also *Cooper v. Asheville Citizen-Times Publishing Co., Inc.*, 258 N.C. 578, 129 S.E. 2d 107 (1963); *Hinkle v. City of Lexington*, 239 N.C. 105, 79 S.E. 2d 220 (1953). Thus, for example, in *Graham v. Wall*, 220 N.C. 84, 16 S.E. 2d 691 (1941), a principal-agent relationship was found to exist despite the testimony of the employer, the employee, and the employee's supervisor, that the employer did not in fact exercise any control.

Though no one factor is controlling, the existence of an employer-employee relationship is frequently evidenced by continuity of employment, periodic compensation on a regular basis rather than lump-sum payments for specific jobs performed, and the absence of special skill or training requirements. *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137 (1944). In *Smith v. Kappas*, 218 N.C. 758, 12 S.E. 2d 693 (1941), the Supreme Court of North Carolina emphasized that agency may be implied "by conduct, by the relations and situation of the parties, by acts and declarations, by matters of omission as well as commission, and, generally by any fact or circumstance with which the alleged principal can be connected and having a legitimate tendency to establish that the person in question was his agent for the performance of the act in controversy:" 12 S.E. 2d at 698.

II

R. K. Grindstaff & Son were engaged in the business of sawmilling and trucking, the latter activity under the direction and control of the junior partner, Ronnie Grindstaff. In November, 1966, the time of the accident, the partnership owned three tractor-trailer units, two of which were closely tied in with the operations of the Bradley Lumber Co. One was leased to the company on a permanent basis. The other, driven regularly by Lewis, was devoted largely, though not exclusively, to hauling lumber for the

Bradley Lumber Co., and was garaged at Bradley's place of business in Marion, North Carolina. It was this vehicle that collided with the Sharpes' automobile shortly after Lewis had completed delivering a load of lumber in Lexington, North Carolina for the Bradley Lumber Company. Bradley's payments for the use of the leased vehicle and for the hauling performed by Lewis amounted to nearly half the annual gross income of the Grindstaff partnership.

The business relationship among the Bradley Lumber Company, the partnership, Grindstaff, and Lewis can only be described as loose and informal, due in part perhaps to a family relationship: Pierce Bradley, the President and sole stockholder of Bradley Lumber Company, was Ronnie Grindstaff's uncle. The lines of authority were not sharply demarcated. This is well illustrated by their method of settling accounts. At the end of every week, Ronnie would meet with Pierce Bradley and his wife, who was secretary-treasurer of the company. After consulting with Lewis as to his mileage and determining the week's mileage on the leased truck, Ronnie would compute the total sum due from the company. No written statement of any kind was prepared or submitted. Ronnie would have Mrs. Bradley draw up three checks: one payable to Ronnie in the amount of $80.00; one payable to Lewis based on his work in hauling lumber for the Bradley Lumber Co. and others; and the balance payable to the Grindstaff partnership.

Lewis received his entire compensation in this manner by checks drawn by Bradley Lumber Company. The company treated Lewis as its employee. It not only carried him on its payroll, but reported him as its employee to the United States Internal Revenue Service, Social Security Administration, and the North Carolina taxing authorities. It also included him in its group hospitalization plan. Moreover, Bradley carried Lewis as an employee for unemploy-

ment and workmen's compensation purposes. By so doing, Bradley Lumber Company was under the protection that the North Carolina law affords employers—relief from unlimited liability at common law for employee injuries proximately caused by the employer's negligence. N. C. Gen. Stat. § 97-10.1 (1965). The company was reimbursed for these expenses in part, but not in full, by the Grindstaff partnership.

Lewis, for his part, reported Bradley Lumber Company as his employer in his state and federal income tax returns. Although he received instructions only from Ronnie Grindstaff, he testified that he did not know whether he was working for Ronnie Grindstaff or Pierce Bradley. Nor did he know whether Ronnie Grindstaff was employed by Bradley Lumber Company.

Ronnie Grindstaff, as Lewis' immediate supervisor, served in a dual capacity. Not only was he a partner of R. K. Grindstaff & Son, but he was also the Vice President and a director of the Bradley Lumber Company. He reported daily at Bradley Lumber Company's yard in Marion where he would receive from Bradley the trucking orders to be relayed to Lewis for delivery. Like Lewis, he was treated as Bradley's employee for tax and accounting purposes, and Ronnie's weekly payment of $80.00 was not reported as partnership income.

We think that these facts ineluctably establish that Lewis was no less an employee of the Bradley Lumber Company than of R. K. Grindstaff & Son and that his negligence which brought injuries to the Sharpes is imputable to both. Although Pierce Bradley testified that he did not supervise any of Lewis' activities, we think there can be no doubt that the Bradley Lumber Company retained the right to control Lewis. If, as the appellee claims, the arrangements with respect to Lewis' employment were root-

ed in a desire of Grindstaff and Bradley to effect a "convenient accommodation," this does not alter the legal consequences of their agreement, particularly when the rights of innocent third parties injured by Lewis' negligence are involved.

We agree with the appellee that the inclusion of Lewis on the payroll of Bradley Lumber Company would not, standing alone, suffice to establish an agency relationship, *Forgay v. North Carolina State University*, 1 N.C. App. 320, 161 S.E. 2nd 602 (1968),[2] although that fact has been given significant probative force. *Lewis v. Barnhill*, 267 N.C. 457, 148 S.E. 2d 536 (1966); *Graham v. Wall*, *supra*. But when Bradley Lumber Company's consistent treatment of Lewis as its employee is combined with Lewis' regular employment in hauling lumber for the company, and the close business relationship that existed between Ronnie Grindstaff and Bradley, the conclusion is inescapable that a principal-agent relation was present. Lewis' immediate supervisor was not only a partner in a concern dependent on Bradley Lumber Company for half its income, but was the Vice President and a director of the lumber company itself. Pierce Bradley's belated disavowal of Lewis as an employee after the accident that injured the Sharpes cannot prevail over the clear evidence to the contrary in this record.

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2. In *Forgay*, the North Carolina Court of Appeals reversed a determination by the workmen's compensation commission that North Carolina State University was an employer of a student working for the town of Madison under a federally-sponsored program of assistance to college students. The university's primary responsibility under the federal program was the distribution of wages. It received no services whatsoever, nor did it assume any responsibility for assigning the students to their off-campus jobs. There was even some uncertainty as to whether or not the university was aware of where the students were working. *Forgay* is clearly distinguishable from the case at hand.

Nor do we think that the admission by the Grindstaff partnership that Lewis was their employee shields Bradley Lumber Company from liability. The North Carolina courts have explicitly recognized that an agent can be in the service of two principals simultaneously, provided both have a right to exercise some measure of control, and there is a common or joint participation in the work and benefit to each from its rendition. *Lewis v. Barnhill, supra; Altman v. Sanders,* 267 N.C. 158, 148 S.E. 2d 21 (1966); *Legette v. J. D. McCotter, Inc.*, 265 N.C. 617, 144 S.E. 2d 849 (1965). *See Restatement (Second) of Agency,* § 226 (1958). These features were present here and the appellants are entitled to judgment against Bradley Lumber Company as well as R. K. Grindstaff & Son.

Reversed and remanded for entry of judgment in favor of the appellants against the appellee.

WINTER, Circuit Judge, dissenting:

In my view, the district judge correctly found the facts and correctly concluded that "[s]ince Bradley Lumber Company, Inc. retained no control over Lewis or Grindstaff as individuals nor over their method of operation, the corporation cannot be considered their employer. Bradley Lumber Company, Inc., therefore, is not liable for the negligence of Lewis on November 25, 1966."

I would affirm on the district judge's opinion. *Sharpe v. Grindstaff,* ..... F.S. ..... (M.D.N.C. 1970).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 71-1050.

Alice K. Sharpe and Juanita Sharpe, by her next friend, H. L. King,

Appellants,

VERSUS

Bradley Lumber Company, Inc.,

Appellee.

ORDER

Upon consideration of the petition of the appellee, Bradley Lumber Company, Inc., for rehearing, and suggesting in the alternative a rehearing en banc, the panel hereby denies rehearing; and as no member of the entire court has requested a rehearing en banc, the suggestion for such a rehearing is likewise denied.

For the Court:

s/ Simon E. Sobeloff
United States Circuit Judge

Filed Sept. 3, 1971.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

(Filed Sept. 24, 1970)

ALICE K. SHARPE, *Plaintiff*

v.

RONALD K. GRINDSTAFF, SR.,
RONALD K. GRINDSTAFF, JR.,
Individually and Trading as R. K. Grindstaff & Son and
LEONARD ROSS LEWIS; and
BRADLEY LUMBER COMPANY, INC., *Defendants*

NO. C-157-WS-67

AND

JUANITA SHARPE, By Her
Next Friend, H. L. KING, *Plaintiff*

v.

RONALD K. GRINDSTAFF, SR.,
RONALD K. GRINDSTAFF, JR.,
Individually and Trading as R. K. Grindstaff & Son and
LEONARD ROSS LEWIS; and
BRADLEY LUMBER COMPANY, INC., *Defendants*

NO. C-130-WS-68

Fred S. Hutchins, Fred S. Hutchins, Jr., and Philip B. Whiting, of Deal, Hutchins & Minor, Winston-Salem, N. C., for plaintiffs.

Perry C. Henson, Greensboro, N. C., for defendants, Ronald K. Grindstaff, Sr., Ronald K. Grindstaff, Jr., and Leonard Ross Lewis.

Richmond G. Bernhardt, Jr., of Smith, Moore, Smith, Schell & Hunter, Greensboro, N. C., and William F. Womble, of Womble, Carlyle, Sandridge & Rice, Winston-Salem, N. C., for defendant, Bradley Lumber Co., Inc.

FINDING OF FACT, CONCLUSIONS OF LAW AND OPINION

GORDON, District Judge.

The morning of November 25, 1966, was clear and cool. The sun shone brightly; the road was dry. Alice Sharpe and her minor daughter, Juanita, and other members of the family, were traveling homeward to Atlanta, along U.S. Highway 29 Bypass (Temporary I-85). About 8:30 they neared a point outside Lexington, North Carolina, where U.S. 29-A returns from the business district to reunite in a "Y" configuration with U.S. 29.

In that moment, having finished breakfast at a nearby truck stop, Leonard Ross Lewis drove his flat bed trailer-tractor rig, empty, onto 29-A, and proceeded also in a southerly direction. He approached the merger point from the left just as the Sharpe automobile, driven by Mrs. Sharpe, approached from the right.

A double yellow line, running approximately 365 feet divided the two southbound lanes. The vehicles met and rode along side by side, each on its own half of the road,

each observing the proper speed limits. When the yellow lines stopped and a broken white line began, Lewis checked his rear view mirror. Unable to see the car hidden in his mirror's blind spot, he flashed his right turn signal and immediately began to change into the right lane. As he crossed the dividing lines, his right front fender struck the automobile's left rear quarter panel. Momentarily, the two vehicles seemed hooked together. The truck jacknifed; and, as it did, the car shot forward, angling the right lane. It crashed into a bridge abutment, bounced off, and came to rest with the remains of a front end pointed north.

Drivers of two following cars witnessed the event. Floyd Mock Leonard managed to brake quickly and avoid involvement. The other vehicle, driven by Mrs. Martha Sink Church, was traveling slowly, far enough behind to remain outside the area of immediate peril. From the evidence, it is found that Mrs. Sharpe was alongside the cab of the truck before the defendant Lewis gave a signal of his intention to turn and Mrs. Sharpe was in such position that she could not see the turn signals.

Mrs. Sharpe and Juanita were both thrown from the automobile. Mr. Leonard and some of the gathering crowd administered first aid. Someone else called an ambulance. Badly hurt and suffering from multiple injuries, they were rushed to a local hospital and later transferred to the North Carolina Baptist Hospital in Winston-Salem where they underwent extended periods of convalescence.

Alice Sharpe and Juanita Sharpe, by her next friend, brought actions to recover damages for medical expenses, permanent injuries and pain and suffering. The cases were consolidated and tried before the Court without a jury. The facts, as found, are set out here and in the discussion which follows.

DISCUSSION

The three topical issues at hand and the order in which they will be discussed are: I. Negligence; II. Agency; and III. Damages.

Since *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 118 (1938), federal courts sitting in civil actions by virtue of diversity jurisdiction have applied the substantive law of the forum state. *Hanes Dye and Finishing Co. v. Caisson Corp.*, 309 F. Supp. 237 (M.D. N.C. 1970).

I. NEGLIGENCE

Negligence in North Carolina is defined as

> "[T]he failure to exercise that degree of care for others' safety which a reasonably prudent man, under like circumstances, would exercise, and may consist of acts either of commission or omission."[1]

North Carolina General Statute § 20-154 provides in pertinent part:

> "(a) the driver of any vehicle upon a highway before . . . turning from a direct line, shall first see that such movement can be made in safety, and * * * whenever the operation of any other vehicle may be affecte dby such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement.
>
> "[T]he violation of this section shall not constitute negligence per se."

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1. Strong, 6 N.C. Index 2d 3, 4.

The duties imposed upon the driver intending to turn from a direct line are twofold: (1) he must first ascertain whether the move can be made in safety and (2) upon ascertaining that another vehicle might be affected, must give a signal, plainly visible, of his intention so to move. *Clarke v. Holman*, 274 N.C. 425, 163 S.E. 2d 783 (1968); *Porter v. Philyaw*, 204 F. Supp. 285 (W.D.N.C. 1962).

Since a violation of this safety statute is not negligence per se, triers of the facts must consider all relevant facts and attendant circumstances in deciding whether the violator has breached his common law duty to exercise due care. *Kinney v. Coley*, 4 N.C. App. 325, 167 S.E. 2d 97 (1969).

The relevant facts and attendant circumstances are these: Lewis had been a truck driver for twenty-seven years. He had driven this particular tractor-trailer unit for about five months prior to the accident. He was well aware that along the right side of his truck was an area known as the "blind spot" (whic htests involving this unit showed to be between 31 and 41 feet depending upon mirror adjustment) and that objects located within this blind spot were not picked up by the mirror. He ha ddriven that section of highway frequently and was familiar with its hazards.

In failing to ascertain whether another vehicle might be present, hidden within the blind spot, Lewis failed to exercise due care before pulling into the right lane. As a proximate result of that failure, the collision in question occurred.

II. AGENCY

R. K. Grindstaff and Ronnie Grindstaff transacting business as "R. K. Grindstaff and Son," a partnership, readily admit that at the time of the collision Leonard Ross Lewis was employed by them and that he was driving

their truck within the course of his employment. Thus, under the doctrine of *respondeat superior* they, as well as Lewis, are liable for whatever damages plaintiffs might be awarded. *Jackson v. Mauney*, 260 N.C. 388, 132 S.E. 2d 899 (1963).

The plaintiffs contend that Lewis, likewise, was an employee of Bradley Lumber Company, Inc., of Marion, North Carolina. It was Bradley's lumber that Lewis had hauled to Lexington upon Grindstaff's truck and unloaded early on the morning of the wreck.

During the trial, evidence unfolded a rather unique business arrangement between Lewis, the Grindstaffs, and Bradley Lumber Company, Inc. Included among the pertinent facts are the following: Ronnie Grindstaff was a nephew of Pierce Bradley, Jr., the president and sole shareholder of Bradley Lumber Company, Inc. Before going into business for himself, Ronnie had worked for Mr. Bradley. He was one of three incorporators of Bradley Lumber Company, Inc., a director,[2] and vice president. He owned no stock[3] and on November 25, 1966, and for sometime before, performed no duties for the company.

Ronnie Grindstaff and his father transacted business under a verbal partnership agreement. The business consisted primarily of trucking and of sawmilling. Ronnie

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2. When Bradley Lumber Company, Inc., was incorporated, January 14, 1964, North Carolina required that there be no fewer than three incorporators (G.S. § 55-6) and no less than three directors (G.S. § 55-25). Beside Pierce, Jr., and Ronnie, the other incorporator and director was Mrs. Marion Bradley, wife of Pierce, Jr.

3. It was permissible under North Carolina law for one person to acquire all stock shares without impairing the corporation's existence (G.S. § 55-3.1). Of the 1500 shares of Bradley common stock on January 15, 1964, one share was given to Marion Bradley and one to Ronnie Grindstaff. This was done on the advice of counsel, the shares being returned later that day to Pierce Bradley, Jr.

supervised the trucks (which were registered in his name) and his father supervised the sawmilling operations. One of the three tractor-trailer units owned by the partnership was, on November 25, 1966, under lease to Bradley Lumber Company, Inc.[4] The partnership sold lumber to Bradley, though Bradley obtained lumber from several sources and the Grindstaffs sold to other customers, as well as to Bradley. A large portion of Grindstaff's trucking business consisted of contract hauling for Bradley, though on occasion, Bradley also contracted with other trucking companies.[5] Bradley owned no financial interest in the Grindstaff operation.

Weekly, Ronnie received a check for $80.00 drawn on Bradley Lumber Company, Inc. Lewis received all of his compensation, except reimbursement for expenses, by checks drawn on Bradley Lumber Company, Inc. Usually, on Thursday nights Lewis would meet with Ronnie to report road hours and miles driven the previous week. Ronnie would calculate Lewis' wages and pass that figure on to Bradley who in turn would draw a check payable to Lewis on Bradley Lumber Company, Inc., in that amount. The number of hours and miles included also those spent working on jobs other than Bradley contract hauls. Bradley would then deduct the total amount, plus 10 per cent handling from what it owed R. F. Grindstaff and Son for the leased truck and for contract hauls and give R. F. Grindstaff and Son a check for the remainder.

Being on the payroll entitled both Ronnie and Lewis to participate in Bradley's group health and group life in-

4. This was not the truck involved in the collision.

5. The leased truck cost Bradley 60 cents per loaded mile and the contract hauls 66 cents per loaded mile. Lewis averaged driving between 700 to 1,000 miles per week, hauling both to and from Bradley's yard on a contract basis.

surance programs. And because they appeared on the payroll, they were reported as employees to the Federal Government for purposes of income taxation and to the State of North Carolina for income taxation and Workman's Compensation.

Because of the records made pursuant to the above, it appears on paper that Ronnie and Lewis were both employees of Bradley. However, the inclusion of their names on the payroll was in the nature of an accommodation, entitling them to participate in insurance plans which, due to the size of Grindstaff's operation, would not otherwise have been available. Ronnie Grindstaff personally hired Lewis, set his wages, and was the only person exercising supervisory authority over him. He alone authorized trips and assigned routes. Though Bradley could have ceased doing business with the Grindstaff partnership, he could not have terminated Lewis' employment with Grindstaff.

In relation to Bradley Lumber Company, Inc., Ronnie Grindstaff stood as an independent contractor. What was said by Justice Devin in *McCraw v. Calvine Mills, Inc.*, 233 N.C. 524, 526, 64 S.E. 2d 658, 660 (1951) and quoted by Justice Bobbitt in *Cooper v. Asheville Citizen-Times Publishing Co., Inc.*, 258 N.C. 578, 129 S.E. 2d 107, 113 (1963) applies here:

> "In its simplest form an independent contractor may be said to be one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work (cites omitted). *When one undertakes to do a specific job under contract and the manner of doing it, including employment, payment and control of persons working with or under him, is left entirely to him, he will be regarded as*

an independent contractor unless the person for whom the work is being done has retained the right to exercise control in respect to the manner in which the work is to be executed. (cites omitted) The test is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has right of control, it is immaterial whether he actually exercises it. (cites omitted)." (Emphasis added.)

Since Bradley Lumber Company, Inc., retained no control over Lewis or Grindstaff as individuals nor over their method of operation, the corporation cannot be considered their employer. Bradley Lumber Company, Inc., therefore, is not liable for the negligence of Lewis on November 25, 1966.

III. DAMAGES

The evidence stands uncontradicted that both Mrs. Sharpe, then forty-one years of age, and Juanita, then eleven years of age; were in good health prior to the accident.

Among her injuries, Mrs. Sharpe sustained a compound fracture of the right distal femur and right proximal tibia, a tear of the lateral meniscus of the right knee, laceration of the right patellar tendon, lacerations of the right forehead, left arm, left hip, left thigh, left calf, lower right leg, and lateral side of the left calf, a mid shaft comminuted fracture of the right ulna, fracture of the right oscalsis (heel bone) and multiple rib fractures bilaterally with a pneumothorax on the right.

The oscalsis did not heal perfectly and it was necessary for Mrs. Sharpe to wear a corrective shoe. The motion in her right knee is restricted and the prognosis there is somewhat bleak, with a possibility of degenerative arthritis later developing.

On July 3, 1967, the scars on her face and right knee were surgically revised; but according to the surgeon, there would still be some degree of permanent residual scarring at these sites.

Included among Juanita's injuries were the following: a craniofacial disjuncture, a comminuted fracture of the mandible with loss of several teeth, a transverse mid shaft fracture of the left femur, a left brachial plexus paralysis, cerebral contusion, facial and scalp lacerations, fractures of the nasal bones, right zygomatic arch and left acetabulum, with a pneumothorax bilaterally.

An injury to the left shoulder girdle has resulted in a partial paralysis of a permanent type.

Injuries to the mouth area have necessitated quite an extensive orthodontic program.

Facial scarring was serious and required plastic surgery. Some residual scarring remains in that area, as well as two scars upon the cheeks where wires were extended from within the oral region to an external headgear apparatus.

Alice K. Sharpe and Juanita Sharpe were hospitalized nearly four months each and during this time were examined and treated by several physicians and specialists.

The plaintiffs are entitled to recover as damages for injuries one compensation in a lump sum for all injuries, past and prospective, from those defendants found negligent. *Hunter v. Fisher*, 247 N.C. 226, 100 S.E.

2d 321 (1957). After giving effect to this rule and carefully considering the nature and extent of the personal injuries sustained by the plaintiffs, it is found that Alice K. Sharpe is entitled to recover of the defendants, save and except Bradley Lumber Company, Inc., the sum of $50,000.00, together with court costs expended; and it is found that Juanita Sharpe, acting by her next friend, H. L. King, is entitled to recover of the defendants, save and except Bradley Lumber Company, Inc., the sum of $65,000.00, together with court costs expended.

In summary, it is concluded that Alice K. Sharpe and Juanita Sharpe, as a proximate result of the negligence of Leonard Ross Lewis, suffered severe and multiple injuries; that Leonard Ross Lewis, when the collision in question occurred, was acting within the scope of his employment for R. K. Grindstaff and Son; that there was no agency relationship either between Lewis and Bradley Lumber Company, Inc., or between the Grindstaffs and Bradley Lumber Company, Inc., and that Alice K. Sharpe was not contributorily negligent in the driving of her automobile.

The foregoing shall constitute findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

Counsel for the plaintiffs will prepare and submit to the Court an appropriate judgment, first presenting same to counsel for the defendants for approval as to form.

s/ Eugene A. Gordon
United States District Judge

September 23, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

(Filed Oct. 9, 1970)

ALICE K. SHARPE, *Plaintiff*

v.

RONALD K. GRINDSTAFF, SR.,
RONALD K. GRINDSTAFF, JR.,
Individually and Trading as R. K. Grindstaff & Son and
LEONARD ROSS LEWIS; and
BRADLEY LUMBER COMPANY, INC., *Defendants*
NO. C-157-WS-67

AND

JUANITA SHARPE, By Her
Next Friend, H. L. KING, *Plaintiff*

v.

RONALD K. GRINDSTAFF, SR.,
RONALD K. GRINDSTAFF, JR.,
Individually and Trading as R. K. Grindstaff & Son and
LEONARD ROSS LEWIS; and
BRADLEY LUMBER COMPANY, INC., *Defendants*
NO. C-130-WS-68

JUDGMENT

On September 24, 1970, a Memorandum Opinion was entered in the above styled cases. In accord with the reasons there set out, it is

ORDERED, ADJUDGED AND DECREED:

1. That Alice K. Sharpe, in C-157-WS-67, have and recover of Ronald K. Grindstaff, Sr., Ronald K. Grindstaff, Jr., Individually and Trading as R. K. Grindstaff and Son, and Leonard Ross Lewis the sum of $50,000.00, together with court costs expended;

2. That Juanita Faith Sharpe, acting by her next friend, H. L. King, in C-130-WS-68, have and recover of the above named defendants the sum of $65,000.00, together with court costs expended.

3. That neither of the plaintiffs recover anything of the defendant, Bradley Lumber Company, Inc., including costs, and each action against the defendant Bradley Lumber Company, Inc., be and the same hereby is dismissed; and

4. That Bradley Lumber Company, Inc., recover of the plaintiffs its court costs expended.

s/ Eugene A. Gordon
United States District Judge

October 8, 1970.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-719

BRADLEY LUMBER COMPANY, INC., *Petitioner,*

v.

ALICE K. SHARPE, *Respondent,*

AND

BRADLEY LUMBER COMPANY, INC., *Petitioner,*

v.

JUANITA SHARPE, By Her Next Friend,
H. L. King, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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December , 1971

INDEX

Question Presented 1

Statement 2

Argument 5

Conclusion 19

CITATIONS

Cases

Accardi v. Pennsylvania R. Co., 383 U. S. 225, 15 L. Ed. 2d 717, 86 S. Ct. 768 (1966) 19

Beach v. McLean, 219 N. C. 521, 14 S. E. 2d 515 (1941) 14

Byrne v. Pennsylvania Railroad Company, 169 F. Supp. 655 (E. D. Pa. 1958), affirmed 262 F. 2d 906 17

Cooper v. Publishing Co., 258 N. C. 578, 129 S. E. 2d 107 (1962) 12

Evans v. Lumber Co., 174 N. C. 31, 93 S. E. 430 (1917) 12

Fulton v. Talbert, 255 N. C. 183, 120 S. E. 2d 410 (1961) 10

Hayes v. Elon College, 224 N. C. 11, 29 S. E. 2d 137 (1944) 7

Kiff v. Travelers Insurance Company, 402 F. 2d 129 (CA 5, 1968) 13

Kirtz v. National Paving and Contracting Co., 214 Md. 243, 134 A. 2d 296 (1957) 16

Lassiter v. Cline, 222 N. C. 271, 22 S. E. 2d 558 (1942) 12

Lindenmuth v. Steffy, 173 Pa. Super. 309, 98 A. 2d 242 (1953) 17

Pearson v. Flooring Co., 247 N. C. 434, 101 S. E. 2d 301. (1958) 14

Pittsburg Steel Corporation v. Hardware Corporation, 175 N. C. 450, 95 S. E. 896 (1918) 10

Robinson, Hudson and Blackburn v. Transportation Co., 214 N. C. 489, 199 S. E. 725 (1938) 15

Siidekum v. Animal Rescue League, 358 Pa. 408, 45 A. 2d 59 (1946) 17

Transport Insurance Company v. Manufacturers Casualty Insurance Company, 226 F. Supp. 251 (E. D. Ark. 1964), affirmed 341 F. 2d 514 17

Vance Trucking Company, Inc. v. Canal Insurance Company, 249 F. Supp. 33 (D. C. S. C. 1966), affirmed 395 F. 2d 391 17

STATUTES

26 U. S. C. 7206, 7207 9

North Carolina General Statute 55-34(a) 10

North Carolina General Statute 55-35 10

North Carolina General Statute 96-8(6)a 8

North Carolina General Statute 96-18 9

North Carolina General Statute 97-2 6

North Carolina General Statute 97-10.1 8

North Carolina General Statute 97-92(e) 9

North Carolina General Statute 97-94 9

North Carolina General Statute 105-163.1(4) 6

North Carolina General Statute 105-163.13 9

OTHER AUTHORITIES

Federal Rules of Civil Procedure, Rule 52, 28 U. S. C. A. 12

5 Moore's Federal Practice, Section 52.03[2] 14

Volume 1, Prentice Hall, Federal Taxes, Section 34,658 6

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-719

BRADLEY LUMBER COMPANY, INC., *Petitioner,*

v.

ALICE K. SHARPE, *Respondent,*

AND

BRADLEY LUMBER COMPANY, INC., *Petitioner,*

v.

JUANITA SHARPE, By Her Next Friend,
H. L. King, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Did not the Court of Appeals correctly conclude as a matter of law from uncontradicted evidence that agency existed between the defendant driver Lewis and defendant Bradley Lumber Company as to the undisputed negligence of Lewis which brought injury and deaths to the Sharpe Family.

STATEMENT

Plaintiffs brought these suits under diversity of citizenship seeking recovery for permanent injuries, pain and suffering, and medical expenses incurred as a result of an automobile accident on November 26, 1966. Defendants were Leonard Lewis, the driver; R. K. Grindstaff & Son, a partnership, owner of the tractor-trailer; and Bradley Lumber Company, a corporation. The complaint averred that Lewis was the agent of both Grindstaff and Bradley. The District Court entered judgment of damages against Lewis and the partnership, but concluded as a matter of law that Lewis was not the agent nor an employee of the corporation, Bradley. On an appeal based solely on the agency question the Court of Appeals reversed, concluding that agency did exist as to the Bradley corporation and that the negligence of Lewis was imputed to Bradley also.

The negligence of Lewis is clear, as is the fact that such negligence destroyed a family unit. Neither the facts of the accident nor the *facts* of Lewis' status with regard to Bradley are disputed. The point of disagreement has to do with the conclusion arrived at from those facts. The District Court *concluded* that "there was no agency relationship either between Lewis and Bradley Lumber Company, Inc., or between the Grindstaffs and Bradley Lumber Company, Inc." (A-19) The Court of Appeals, in reversing, stated that "the conclusion is inescapable that a principal-agent relation was present." (A-6) Bradley maintains in its petition that the Court of Appeals improperly set aside findings of the District Court and substituted its own findings of *fact*. Actually, the Court of Appeals corrected, very properly, the *conclusion* reached by the District Court from the uncontradicted facts.

But the opinion of the Court of Appeals shows clearly that the uncontradicted facts compelled the conclusion of

law that agency *did* exist. It made no change in the District Court's findings of fact. Indeed the Court of Appeals used the findings of fact to reach the correct conclusion of law.

The District Court stated in its opinion: "During the trial, evidence unfolded a rather unique business arrangement between Lewis, the Grindstaffs, and Bradley Lumber Company, Inc." (A-14) The District Court resolved this "unique business arrangement" by *concluding* that there was no agency relationship either between Lewis and Bradley or between the Grindstaffs and Bradley and that Lewis' negligence was not imputed to Bradley. (A-19) In so doing, it erred.

What do the uncontradicted facts as found by the District Court *and* the Court of Appeals show?

a) Lewis received all of his compensation from Bradley (District Court Opinion, A-15; Court of Appeals Opinion, A-4); and

b) Lewis was paid by checks drawn by Bradley (District Court Opinion, A-15; Court of Appeals Opinion, A-4); and

c) Lewis participated as an employee of Bradley in its group health and life insurance (District Court Opinion, A-15; Court of Appeals Opinion, A-4); and

d) Lewis was carried on Bradley's payroll (District Court Opinion, A-15, 16; Court of Appeals Opinion, A-4); and

e) Lewis was claimed by Bradley as its employee for federal and state income tax purposes (District Court Opinion, A-16; Court of Appeals Opinion, A-4); and

f) Lewis was reported by Bradley as its employee for Workmen's Compensation purposes (District Court Opinion, A-16; Court of Appeals Opinion, A-5); and

g) Bradley reported Lewis as its employee to the Social Security Administration and for unemployment compensation purposes (Court of Appeals Opinion, A-4); and

h) Lewis reported Bradley Lumber Company as his employer in his state and federal income tax returns (Court of Appeals Opinion, A-5); and

i) Ronnie Grindstaff was one of three incorporators of Bradley Lumber Company, Inc., a director, and vice-president (District Court Opinion, A-14; Court of Appeals Opinion, A-5); and

j) Weekly, Ronnie received a check for $80.00 drawn on Bradley Lumber Company, Inc. (District Court Opinion, A-15; Court of Appeals Opinion, A-5); and

k) Ronnie participated as an employee of Bradley in its group health and life insurance (District Court Opinion, A-15); and

l) Ronnie appeared on Bradley's payroll (District Court Opinion, A-15, 16; Court of Appeals Opinion, A-5); and

m) Ronnie was claimed by Bradley as its employee for federal and state income tax purposes (District Court Opinion, A-16; Court of Appeals Opinion, A-5); and

n) Ronnie was reported by Bradley as its employee for Workmen's Compensation purposes (District Court Opinion, A-16); and

o) Ronnie reported daily at Bradley Lumber Company's yard in Marion, where he would receive the trucking orders to be relayed to Lewis for delivery (Court of Appeals Opinion, A-5); and

p) The truck driven by Lewis was garaged at Bradley's place of business in Marion, North Carolina (Court of Appeals Opinion, A-4); and

q) Ronnie Grindstaff's weekly payment of $80.00 from Bradley Lumber Company was not reported as Grindstaff partnership income (Court of Appeals Opinion, A-5); and

r) It was Bradley's lumber that Lewis had hauled to Lexington, North Carolina on the morning of the wreck (District Court Opinion, A-14; Court of Appeals Opinion, A-4).

Not a single one of these facts is contradicted. Most appear in both the District Court opinion and the Court of Appeals opinion. Thus, the Court of Appeals accepted the basic specific facts found by the District Court. The Court of Appeals reversed only the *conclusion of law* reached from these facts.

ARGUMENT

1. When a thing quacks like a duck, waddles like a duck, looks like a duck, acts like a duck, and is held out by itself and others to be a duck, the conclusion is inescapable that it is a duck. Such was the case here. Under the applicable law, the undisputed facts conclusively establish that Lewis was Bradley's employee. Bradley held Lewis out as its employee—to its insurers; for federal income taxes; for state income taxes; for unemployment benefits; for workmen's compensation benefits; for social security benefits. Neither the District Court nor Bradley challenge these facts.

—and neither the District Court nor Bradley can change the conclusion required by law from these facts.

The Internal Revenue Service Regulations are most specific. In reporting "employees" for withholding tax purposes, and thus as a deductible expense, Bradley represented it was the common law employer of Lewis.

> "Reg. Sec. 31.3401 (c)-1 (TD 6259, filed 10-25-57; republished in TD 6516, filed 12-19-60.) *Employee* (a) The term 'employee' includes every individual performing services if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee . . . "(b) Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the results to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done . . ."
>
> (Vol. 1, Prentice-Hall, Federal Taxes, 34,658, p. 34,569) See also definition of "employee" for State income taxes, North Carolina General Statutes 105-163.1(4).

Similarly, Bradley, as a matter of law, must be held to have recognized the applicable sections of the Workmen's Compensation Act of North Carolina (G.S. 97-1, et seq.) and numerous decisions construing the act. North Carolina General Statutes 97-2 defines employee as:

> "The term 'employee' means every person engaged in an employment under any appointment or con-

tract of hire or apprenticeship, express or implied, oral or written, . . . but excluding persons whose employment is . . . not in the course of the trade, business, profession, or occupation of his employer . . . ."

A landmark decision in North Carolina Workmen's Compensation law was *Hayes v. Elon College*, 224 N. C. 11, 29 S. E. 2d [illegible]. It states:

> "By express terms the Act applies only where the employer-employee relationship exists. Sec. 8081 (i), Michie's N. C. Code of 1939; G. S., 97-2; *Winslow v. Carolina Conference Association*, 211 N. C. [illegible], [illegible] S. E. [illegible]; *Lee v. American Enka Corp.*, 212 N. C. [illegible], 193 S. E. 809.
>
> "Except as to public officers the definition of 'employee' contained in the Act adds nothing to the common law meaning of the term. Nor does it encroach upon or limit the common law meaning of 'independent contractor.' *Bryson v. Lumber Co.*, *supra*, 202 N. C. [illegible], 164 S. E. 276); *Beach v. Mickam*, *supra*, 214 N. C. 521, 14 S. E. 2d 515). The Act includes only the one and thus excludes the other. Expressio *unius exclusio alterius*.
>
> "Hence, in judicially determining the preliminary question of coverage the terms 'employee' and 'independent contractor' must be given their natural and ordinary meaning and effect. It must be presumed, nothing else appearing, that they are used in their accepted legal sense . . . ." (citations omitted)

It is, therefore, obvious that if Lewis had been injured in the very accident here involved, Bradley would have been liable as employer under the Workmen's Compensa-

tion Act. In addition, Bradley, by reporting Lewis as its employee, received the benefits of the Act. Thus, North Carolina General Statutes 97-10.1 provides: "If the employee and the employer are subject to and have accepted and complied . . . (with Workmen's Compensation Act) . . . then the rights and remedies herein granted . . . shall exclude all other rights and remedies of the employee . . . as against the employer at common law or otherwise . . ." So, when the District Court concluded that the arrangement "was in the nature of an accommodation" for Lewis and Ronnie Grindstaff, it erred in failing to take into account that Bradley—as a matter of law—was receiving the protective benefits conferred by North Carolina General Statutes 97-10.1. Bradley cannot be held an employer for benefits (i.e., protection against tort actions by Lewis), but not an employer as to burdens (vicarious liability for torts of Lewis).

Bradley also, as noted by the District Court and the Court of Appeals opinions, reported Lewis as its employee for unemployment insurance and benefits under Chapter 96, Employment Security, General Statutes of North Carolina. In so doing, it represented that Lewis was an "employee" in Bradley's "employment." The law is specific: (N. C. G. S. 96-8(6)a.)

> " 'Employment' means service performed . . . for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term 'employee' includes an officer of a corporation, *but such term does not include* (*i*) *any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status*

of an independent contractor or (ii) any individual (except an officer of a corporation) who is not an employee under such common-law rules . . ." (emphasis supplied)

The District Court concluded as a matter of law that an "independent contractor" status existed (District Court Opinion, A-16). In so doing, it erred as a matter of law. Bradley, as found by the District Court and the Court of Appeals, had represented that Lewis did not have ". . . the status of an independent contractor." (Cf. N. C. G. S. 96-8(6)a., above)

Each of the federal or state laws cited above has penalty sections, imposing fines and criminal penalties for misrepresentations and violations. (26 U.S.C. 7206, 26 U. S. C. 7207; State Income Taxes: G. S. 105-163.13; Workmen's Compensation: G. S. 97-92(e), 97-94; Unemployment Insurance: G. S. 96-18) The District Court found that Bradley represented and accepted Lewis as its "employee" for federal and state tax benefits, for workmen's compensation benefits and unemployment benefits. Having made such findings, would not the District Court's conclusion of law that Lewis—instead of being an employee as represented by Bradley—was an independent contractor, subject Bradley and its officers to criminal penalties? That being so, it was error for the District Court to ignore the plain thrust and effect of the law to reach its conclusion as to the independent contractor's status. To so conclude would be to hold that Bradley's solemn representations, under penalty of fine and imprisonment, were false and fraudulent. Violation of law is never presumed.

In so concluding, the District Court looked to its assumption that Bradley's motives in representing that Lewis and Ronnie Grindstaff were employees "was in the nature of an accommodation." (District Court Opinion, A-16)

But the various federal and state laws invoked by Bradley do not provide for an "accommodation." They provide for legal consequences of elections voluntarily made.

Motivation for an act cannot change the legal consequences of an act. The District Court was correct in finding that: "Because of the records made . . . (by Bradley) . . . it appears on paper that Ronnie and Lewis were both employees of Bradley." (District Court Opinion, A-16) It erred in upsetting its own correct finding of fact by permitting motivation to change fact. One's sole motive in employing his shiftless brother-in-law Marmaduke may be to get him off the living room couch. But Marmaduke is nevertheless an employee.

The law of North Carolina requires that "The officers of a corporation *shall* consist of a president, one or more vice presidents . . ." (N. C. G. S. 55-34(a)) [emphasis supplied] .It also provides:

> "N. C. G. S. Sec. 55-35. Duty of directors and officers to corporation—Officers and directors shall be deemed to stand in a fiduciary relation to the corporation and to its shareholders and shall discharge the duties of their respective positions in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions."

Neither Ronnie nor Bradley could be presumed to have violated this statutory duty, as the District Court concluded. Indeed, in North Carolina for a corporate officer to receive a salary from a corporation—while not performing any services—is recognized as fraud. *Fulton v. Talbert,* 255 N. C. 183, 120 S. E. 2d 410 (1961). As a director, also, Ronnie was held to an even higher standard of good faith. *Pittsburg Steel Corporation v. Hardware Corporation,* 175 N. C. 450, 95 S. E. 896 (1918).

Thus, under the law of North Carolina, Ronnie as a director and vice president of Bradley, must be presumed to have been acting in the course and scope of that employment and in furtherance of the interests of Bradley. To conclude otherwise would allow fraud and violation of law to form the basis for permitting Bradley to reap the benefits (tax deductions, workmen's compensation protection, unemployment benefits) of holding Ronnie out as an employee, but to avoid the burden of vicarious liability. It is a fundamentally unfair position and cannot be sustained.

The District Court correctly analyzed North Carolina law to the effect that the right to control is a determinative factor in the employer-employee relationship. But in applying that principle, it ignored the facts which the Court itself had found. In concluding that Bradley "retained no control over Lewis or Grindstaff as *individuals*" (District Court Opinion, A-17) [emphasis supplied], it missed the point that Bradley has a basic control over Lewis and Ronnie as employees, and additionally as to Ronnie in his capacities as vice president and director.

Simply put, Bradley had the right to fire them.

Bradley put them on its payroll; Bradley alone had the right to take them off. Bradley claimed Lewis and Ronnie as employees for federal and state income tax deductions; Bradley alone could disclaim them for tax purposes. Bradley claimed them as employees under Workmen's Compensation; Bradley alone had the right to disavow the protection of the Workmen's Compensation law. Bradley listed them as employees for unemployment benefits; Bradley alone had the right to change that listing. Bradley paid Lewis and Ronnie by and from its corporate payroll bank account; Bradley alone had control over that payroll and bank account. Bradley alone chose the method of delivery to its customers using Lewis' and Ronnie's ser-

vices; Bradley alone had the right to terminate such method.

This complete power of termination, i.e., the right to fire, is the single most important factor in determining an employer-employee relationship. *Cooper v. Publishing Co.*, 258 N. C. 578, 129 S. E. 2d 107 (1962); *Lassiter v. Cline*, 222 N. C. 271, 22 S. E. 2d 558 (1942); *Evans v. Lumber Co.*, 174 N. C. 31, 93 S. E. 430 (1917). Here, Bradley had

- an absolute right to terminate both as to Lewis and Ronnie; and
- carried both Lewis and Ronnie on its payrolls; and
- claimed both as employees for tax deductions; and
- paid withholding and social security on both; and
- claimed both for the protection of the Workmen's Compensation Law.

Bradley had continued to hold out both Ronnie and Lewis as its employees for many years. This trip on which the accident occurred was one of the multiple similar trips made for Bradley by Lewis prior to this accident, while claimed by Bradley as an employee. It was one more instance of the use of an employee to carry out Bradley's business.

Bradley states now, in seeking this writ, that the Court of Appeals substituted itself as the fact-finder, in violation of Federal Rule of Civil Procedure, 28 U.S.C.A., Rule 52. It misses the point that material facts are not challenged. Those facts are uncontradicted. It is the conclusion of law drawn by the District Court that was changed by the Court of Appeals.

Bradley cannot point to a single instance in the record—before this accident, before this action was started—in which it disclaimed Ronnie and Lewis as its employ-

ees. Only after the accident, after the lawsuit, did Bradley say in effect: "Well, we know that for years they've been on our payroll, been claimed as employees for tax, insurance, workmen's compensation, unemployment benefits, but after all this was just a private arrangement." But, to permit Bradley to escape vicarious liability, it is necessary to hold that this "private arrangement" supercedes the legal consequences of Bradley's multiple yearly representations as to employment made in solemn form to various governmental and private authorities. Even after the accident Bradley continued to make those solemn affirmations as to their status as employees.

Only in this lawsuit—where there are no benefits flowings from the employer-employee relationship—does Bradley disclaim Ronnie and Lewis as its employees. Surely it would be unfair to permit a corporation to claim, insist upon, and accept the benefits of its employment relation with Ronnie and Lewis, but to escape the legal consequences here of what Bradley insists upon for every other purpose. The District Court erred in allowing such a conclusion. The Court of Appeals corrected that error of law.

As noted in *Kiff v. Travelers Insurance Company*, 402 F. 2d 129 (CA 5, 1968), as against a contention that an appellate court cannot set aside a jury verdict:

> ". . . However, this limitation on our scope of review is not applicable when all that need be determined is the legal significance of undisputed facts.
>
> > " '[W]here evidence is credible, reasonable, uncontradicated and unimpeached, no question for the jury but only one of law is presented.' *American Hardward Mutual Ins. Co. v. Vick*, 5th Cir. 1959, 268 F. 2d 183; 184.

> "The record discloses that the determinative factual ingredients of Larousse's employment status are not disputed. The only question presented, then is whether these basic facts require the imposition of liability upon Harvey Crane Service and its insurer for the acts of its servant through application of the doctrine of respondeat superior. This question of law should have been decided by the court, not the jury." (402 F. 2d 131)

and as stated in 5 Moore's Federal Practice, Sec. 52.03[2], p. 2662, 2663:

> "But in reviewing the judgment, so far as questions or conclusions of law are concerned, the appellate court is not concluded in any degree by the trial court's view of the law."

Where, as here, the material facts are uncontradicted, the question of whether one is an employee or an independent contractor is one of law for the court. *Pearson v. Flooring Co.*, 247 N. C. 434, 101 S. E. 2d 301 (1958); *Beach v. McLean*, 219 N. C. 521, 14 S. E. 2d 515 (1941). That being the case, the Court of Appeals very properly reversed the conclusion of law of the District Court that there was no agency relationship between Lewis and Bradley. The Court of Appeals properly reached the legal conclusion that a principal-agent relation was present. (A-6)

2. Bradley also maintains that there was no finding that Lewis was acting within the scope of his employment for Bradley at the time of the accident. However, both the District Court and the Court of Appeals found that it was Bradley's lumber that Lewis had hauled to Lexington on the morning of the wreck. (District Court Opinion, A-14; Court of Appeals Opinion, A-4). This was well found from the evidence. It was shortly after Lewis had completed delivering a load of lumber in Lexington for Bradley Lumber

Company that the accident occurred. (Court of Appeals Opinion, A-4) Even Bradley admits, in its petition, that delivery had just been completed when the accident occurred: (Petition, page 6) The District Court and the Court of Appeals, in short hand form, found, and the uncontradicted evidence on this point shows, that the sole reason for the trip was to transact Bradley's business, with lumber whose selection and loading to comply with Bradley's customer's order had been supervised and performed by a Bradley vice president; and the movement of which, by Lewis, had been ordered by the same vice president. Lewis, at and during the trip, was listed, claimed and paid *as an employee* by Bradley. (District Court Opinion, A-15, 16; Court of Appeals Opinion, A-4, 5) Obviously, then, the trip to Lexington was, and the *necessary return trip* would have been, if the accident had not intervened, in the course and scope of Bradley's business. See *Robinson, Hudson & Blackburn v. Transportation Co.*, 214 N. C. 489, 493, 199 S. E. 727 (1938), in which the Court pointed out that a return trip was "about the master's business."

Bradley, however, attempts to maintain that Lewis deviated from the direct route home and thereby abandoned Bradley's business. (Petition, page 6) But note this: Bradley's deviation argument necessarily concedes that the return trip would have been in the course and scope of Bradley's business. If the return trip was not in Bradley's interest, then deviation would be irrelevant. Thus, to escape the consequences of that conceded "course and scope" Bradley argues that deviation from the usual route constitutes abandonment of Bradley's business. In so doing, Bradley misses the essential point. There is no reason, in law or fact, that the trip on which Lewis was engaged at the time of collision could not be a dual purpose return trip adapted partially for the partnership purposes (i.e., wheel alignment) and primarily to return to Bradley's

place of business from the delivery made for Bradley. What might be considered a "deviation" in a case of a single isolated instance of the use of a "for hire" truck certainly could not be labeled a deviation when it was part and parcel of a pattern of mutual cooperation during a continuing relationship that lasted for many years. Dual purpose would not obviate Bradley's vicarious liability.

Obviously, the trip to Lexington having been made in the course and scope of Bradley's business, the essential return trip would have been in such course and scope. It was essential to return the tractor-trailer for further use by Bradley. It was also essential to return the billing and receipt ticket signed by Bradley's customer so that Bradley could receive payment for the lumber sold. That being so, can it be seriously contended that the portion of the trip during which the accident occurred was a complete abandonment of the essential return trip required by Bradley's business? But to escape liability, Bradley must carry the burden of showing complete abandonment.

In *Kirtz v. National Paving and Contracting Co.*, 214 Md. 243, 134 A. 2d 296 (1957), one Sudbrook owned dump trucks and furnished them to defendant National on a tonnage haul price basis; her drivers took directions as to destinations from National's superintendent; on a delivery trip the accident leading to plaintiff's injuries occurred. On the point of dual employment, the Court said

> "The jury found that Ogle was the servant of Sudbrook when the accident happened. The appellant maintains that he also was the servant of National. The question therefore arises: Can a servant have two masters, not joint employers, at one and the same time? This must be answered in the affirmative. A person may be the servant of two masters, not joint employers, at one time as to one act, pro-

vided that the service to one does not involve abandonment of the service to the other. *Baur v. Calic, supra;* Rest. Agency, sec. 226; *Kimble v. Wilson,* 352 Pa. 275, 42 A. 2d 526, 531." (134 A. 2d 301)

See also *Vance Trucking Company, Inc. v. Canal Insurance Company,* 249 F. Supp. 33 (D. C. S. C. 1966), affirmed 395 F. 2d 391; *Transport Insurance Co. v. Manufacturers Casualty Insurance Company,* 226 F. Supp. 251 (E. D. Ark. 1964), affirmed 341 F. 2d 514; *Byrne v. Pennsylvania Railroad Company,* 169 F. Supp. 655 (E. D. Pa. 1958), affirmed 262 F. 2d 906; *Lindenmuth v. Steffy,* 173 Pa. Super. 309, 98 A. 2d 242 (1953); *Siidekum v. Animal Rescue League,* 353 Pa. 408, 45 A. 2d 59 (1964).

Under the uncontradicted facts here, there could be no abandonment of the scope and course of Bradley's business when the return trip was, at least, for their mutual benefit. Again, it is emphasized that Bradley's business brought about the entire trip—to Lexington and return. Where in the record are there any facts to show a complete abandonment of Bradley's business? But, as noted in the cases cited above, abandonment must be shown. The mutual interest of Bradley and the partnership on the return trip have been clearly demonstrated above. It was while Lewis was carrying out the mutual interests of Bradley and the partnership that the accident occurred.

The Sharpes submit that it is clear from its opinion that the Court of Appeals found Lewis to have been acting in the course and scope of his employment for Bradley at the time of the accident. What did the Court of Appeals say?

"It was this vehicle that collided with the Sharpes' automobile *shortly after Lewis had completed de-*

livering a load of lumber in Lexington, North Carolina for the Bradley Lumber Company." (A-4) [emphasis supplied]

"We think these facts ineluctably establish that Lewis was no less an employee of the Bradley Lumber Company than of R. K. Grindstaff & Son and that *his negligence which brought injuries to the Sharpes in imputable to both.*" (A-5) [emphasis supplied]

"But when Bradley Lumber Company's consistent treatment of Lewis as its employee is combined with Lewis' regular employment in hauling lumber for the Company, and the close relationship that existed between Ronnie Grindstaff and Bradley, *the conclusion is inescapable that a principal-agent relation was present.*" (A-6) [emphasis supplied]

"The North Carolina courts have explicitly recognized that an agent can be in the service of two principals simultaneously, provided both have a right to exercise some measure of control, and there is a common or joint participation in the work and benefit to each from its rendition. (citations omitted) *These features were present here* and the appellants are entitled to judgment against Bradley Lumber Company as well as R. K. Grindstaff & Son." (A-7) [emphasis supplied]

From these statements, there can be no doubt that the Court of Appeals found Lewis to have been acting in the course and scope of his employment for Bradley at the time of the accident. Even had the Court of Appeals not made it so clear, in the light of the uncontradicted facts, it is not necessary that the case be remanded for consideration of that issue, for those facts "ineluctably establish"

that the issue is without merit. When a contention is wholly without merit, the case need not be remanded for decision on the point. *Accardi v. Pennsylvania R. Co.*, 383 U. S. 225, 15 L. Ed. 2d 717, 86 S. Ct. 768 (1966).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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